

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH CAROLINA

¹n Equity No.

FRED WARING,

Plaintiff,

- against -

RICHARD AUSTIN DUNLEA,

Defendant.

B I L L O F C O M P L A I N T

The complaint of the plaintiff alleges the following facts:

1. The plaintiff, Fred Waring, has been at all times hereinafter referred to and is a citizen ^{and resident} of the United States and of the State of Pennsylvania.
2. Upon information and belief, that the defendant, Richard Austin Dunlea, was at said times and is a citizen of the State of North Carolina, and is a resident of and domiciled in said State, and has his principal place of business in Wilmington, North Carolina.
3. The matter in controversy in this cause exceeds, exclusive of interest and costs, the sum or value of \$3,000. and is between citizens of different states.
4. That the plaintiff is the sole and exclusive conductor of the orchestra known as "Fred Waring and His Pennsylvanians" and is solely and exclusively possessed of all rights of ownership and property of the interpretations and performances of said orchestra.

5. That the plaintiff is and has been for a long time past a unique and individual artist and performer in his field as an orchestra conductor and interpretive artist and has an established reputation, both national and international, as such.

6. That the plaintiff's interpretive performances are entirely unique and individual to himself and are generally so recognized by the public and that they are specifically recognized as his own personal and individual interpretations and are therefore unique.

7. That prior to and at said times the plaintiff was and at the present time he is engaged in the business of appearing with his said orchestra as a leading attraction entitled "Fred Waring and His Pennsylvanians" in theatrical performances consisting of the rendition of his musical interpretations and creations in concerts. That the plaintiff has received as payment for such of said performances respectively as are now completed substantial amounts of money and that the plaintiff reasonably expects to make with his said orchestra similar appearances in the future and to receive fully as large amounts of money therefor respectively as has been received by him for said past performances respectively.

8. That prior to and at said times the plaintiff was and at the present time he is engaged in the business of appearing with his said orchestra in performances entitled "Fred Waring and His Pennsylvanians" in hotels, cafes, restaurants, ballrooms, music halls and in other places attended by the public, consisting of the rendition of his musical interpretations and creations in concerts and/or as music to which there might be public dancing; that the plaintiff has received as payment for such of said performances respective-

ly as are now completed substantial amounts of money and that the plaintiff reasonably expects to make with his said orchestra similar performances in the future and to receive fully as large amounts of money therefor respectively as have been received by him for said past performances respectively.

9. That prior to and at said times the plaintiff was and at the present time he is engaged in the business of making with his said orchestra radio broadcasts entitled "Fred Waring and His Pennsylvanians" over leading national radio broadcasting stations and systems or "networks" of radio broadcasting stations consisting of the rendition of his musical interpretations and creations; that the plaintiff has received as payment for such of said radio broadcasts respectively as are now completed substantial amounts of money and that the plaintiff reasonably expects to make with his said orchestra similar radio broadcasts in the future and to receive fully as large amounts of money therefor respectively as have been received by him for said past radio broadcasts respectively.

10. That as part of his business of making with his said orchestra radio broadcasts as aforesaid, the plaintiff has from time to time in the past entered into engagements whereby he agreed that he and his said orchestra would perform on the radio at intervals extending over definite periods of time in the interests of one or more persons exclusively and that he reasonably expects to enter into further engagements of this nature.

11. That the plaintiff and his said orchestra have for considerable time past been engaged under an agreement with the Ford Motor Company and continues to be so en-

gaged in rendering radio broadcast performances at specified intervals extending over a definite period of time in the business interests of the said Ford Motor Company.

12. That in accordance with said agreement between the plaintiff and the Ford Motor Company, electrical transcriptions were to be made, and were so made, of plaintiff's radio broadcast performances for reproduction purposes over broadcasting facilities of various radio stations for definite periods of time, for which time the Ford Motor Company compensated the owners and operators of said radio stations, for use solely and exclusively in connection with broadcasts sponsored by and in the business interests of the said Ford Motor Company.

13. That all the rights and property in and to said performances and interpretations and all electrical transcriptions thereof, including the common law right of property therein, are the property of and belong to the plaintiff herein, with the exception of the right to use such electrical transcriptions in connection with broadcasts sponsored by and in the business interests of the Ford Motor Company, as provided in the aforesaid agreement between the plaintiff and the said Ford Motor Company.

14. That the provisions of said agreement relating to the compensation to be paid to the plaintiff for making electrical transcriptions for broadcast purposes and permitting their use, pursuant to said agreement, were formulated and incorporated in the said agreement in reliance upon the reasonable belief of the plaintiff and the said Ford Motor Company that the said electrical transcriptions would be used and broadcast solely, in accordance with the terms of said agreement, over radio stations designated by the Ford Motor Company and for definite broadcast periods

purchased by said Ford Motor Company.

15. That the plaintiff's performances and interpretations of numerous musical compositions have been transcribed and recorded pursuant to the aforesaid agreement between the plaintiff and the Ford Motor Company, among which was the musical composition hereinafter referred to and entitled "Wa-Hoo", and that the said transcriptions and records contained a legend to the effect that same were Ford Dealers Programs, indicating that they were to be broadcast by radio solely in connection with the business interests of the Ford Motor Company, in accordance with the terms of the aforesaid agreement.

16. That upon information and belief, the defendant, Richard Austin Dunlea, owns and operates for profit by license from the Federal Communications Commission a radio broadcasting station located in Wilmington, North Carolina, and known and designated as Station WMFD, and in connection with and as part of the operation of said broadcasting station, the defendant appropriated at least one of the aforesaid electrical transcriptions containing the plaintiff's performance and interpretation of the musical composition entitled "Wa-Hoo", and the defendant did on the 25th day of June, 1936, at about 2:17 P. M. Eastern Standard Time broadcast and reproduce the said electrical transcription containing the said musical composition by means of the radio broadcasting facilities of said Station WMFD and sponsored the said broadcast on behalf of the defendant alone and in conjunction with persons other than the Ford Motor Company for his own use and benefit and not in connec-

tion with any program sponsored by or in the interests of said Ford Motor Company.

17. That the defendant operates his said broadcasting station upon a radio frequency and wave length which cause said broadcasts to be received and heard not only by large numbers of the general public in substantially all parts of the said District, but by persons in States other than the State of North Carolina, so as to cause the defendant's operation of said broadcasting station to be interstate in character and extent.

18. That the aforesaid acts of the defendant in broadcasting the electrical transcription containing the plaintiff's performance and interpretation of the said musical composition was done and caused to be done without authority or right and without any accounting to the plaintiff and in violation of the plaintiff's rights, with the result that the defendant appropriated the plaintiff's talents and efforts for his own gain and profit without the consent of the plaintiff.

19. That, upon information and belief, the defendant, Richard Austin Dunlea, received notice of the limited use to which said transcriptions could be put by virtue of the aforesaid legend appearing on each of them.

20. That by broadcasting reproductions of said electrical transcription or causing the same to be broadcast, the defendant caused irreparable damage to the plaintiff, including the following:

(a) Interference with and appropriation without right of the plaintiff's common law property in and to his individual and unique musical interpretations and creations through the use of the aforesaid transcriptions in radio broadcasts.

(b) Interference with and causing breaches of the aforesaid agreement between the plaintiff and the said Ford Motor Company by the unauthorized use, broadcast and reproduction of the aforesaid electrical transcription in radio broadcasting, *in North Carolina and elsewhere.*

(c) Making the services of the plaintiff and his orchestra less in demand for theatrical, hotel, cafe, restaurant, ballroom, music hall and radio performances as the result of the frequent and uncontrolled radio broadcasts of transcriptions of the plaintiff's musical interpretations and creations over said Station WMFD, which have caused the performances of the plaintiff personally with his said orchestra to be less attractive to the public because of the frequency with which it has heard performances of the plaintiff and his said orchestra through this medium, thereby interfering with the plaintiff's opportunity to obtain contracts for radio broadcasting, theatrical and other public performances of himself personally with his said orchestra and with his opportunity to make such performances.

(d) Injury to the plaintiff's reputation as an individual and unique artist of genius and integrity as the result of causing the public to hear frequently performances of the plaintiff and his said orchestra through the uncontrolled medium of radio broadcasts of electrical transcriptions made by the plaintiff and his orchestra, thereby causing a decrease of public interest in the plaintiff's efforts.

(e) Reduction of the value to others of engagements with the plaintiff for exclusive performances by the plaintiff personally with his said orchestra on the radio and elsewhere through the uncontrolled use of the aforesaid transcriptions in broadcasting.

(f) Interference without right with said agreement between the plaintiff and said Ford Motor Company through the unauthorized use in radio broadcasts, for the defendant's own gain and profit, of electrical transcriptions manufactured pursuant to the terms of said agreement.

(g) Engagement in unfair competition with the plaintiff in his various fields of artistic activity by broadcasting by radio, or causing to be so broadcast, without right, transcriptions manufactured from personal radio broadcasts made by the plaintiff and his orchestra, thereby causing the plaintiff, in effect, to be competing with himself.

21. That the acts of the defendant hereinabove complained of have caused deception of the public.

22. That the defendant threatens to engage in the future in acts similar to those herein complained of by broadcasting reproductions of electrical transcriptions manufactured from personal radio broadcasts made by the plaintiff and his orchestra under the aforesaid agreement between the plaintiff and the Ford Motor Company, and that the plaintiff cannot prevent the repetition of such acts without the aid of this Court.

23. That to permit the defendant to engage in the future in acts similar to those herein complained of, as he threatens to do, will cause further irreparable damage to the plaintiff, including damage in the nature of that described in Paragraph 20 hereof and further deception of the public.

24. That the plaintiff has no adequate remedy at law against the defendant in the premises complained of.

25. That the value of the subject matter herein, and property rights of the plaintiff in the aforesaid performances is, in the opinion of the plaintiff, vastly in excess of the sum of Three Thousand (\$3,000) Dollars.

WHEREFORE, the plaintiff prays:

1. That the defendant, his servants, agents and attorneys, be forthwith restrained, pending further order of this Court, from in any manner causing to be used for radio broadcasting purposes, using for said purposes, aiding in the use of for said purposes, or doing any act to promote the use of for said purposes, any electrical transcription manufactured from personal radio broadcasts made by the plaintiff and his said orchestra, in pursuance with the plaintiff's aforesaid agreement with the Ford Motor Company, other than in the business interests of the Ford Motor Company, without the consent of the plaintiff.

2. That the defendant, his servants, agents and attorneys, be forthwith restrained, pending further order of this Court, from in any manner causing to be used for radio broadcasting purposes, using for said purposes, aiding in the use of for said purposes or doing any act to promote the use of for said purposes, any electrical transcription manufactured from personal radio broadcasts made by the plaintiff and his orchestra, without the consent of the plaintiff.

3. That the defendant, his agents, servants and attorneys, be forthwith restrained, pending further order of this Court, from in any manner causing to be used for commercial purposes, using for said purposes, aiding in the use of for said purposes or doing any act to promote the use of for said purposes, any electrical transcription manufactured from a personal broadcast made by the plaintiff and his said orchestra, bearing a legend to the effect that such transcription is not to be used for any commercial purpose other than in the business interests of the Ford Motor Company, whether or not such legend defines 'commercial purpose' to include radio broadcasting, without the consent of the plaintiff.

4. That the defendant, his agents, servants and attorneys, be forthwith restrained, pending further order of this Court, from in any manner causing to be used for commercial purposes, using for said purposes, aiding in the use of for said purposes, any electrical transcription manufactured from a personal broadcast made by the plaintiff and his said orchestra, without the consent of the plaintiff.

5. That the defendant, his agents, servants and attorneys, be forthwith restrained, pending further order of this Court, from in any manner interfering or threatening to interfere with any agreement between the plaintiff and the Ford Motor Company, whereby the plaintiff has agreed to make electrical transcriptions for broadcast purposes, to be used solely in connection with broadcasts sponsored by and in the interest of the said Ford Motor Company, and not to be used for any commercial purposes or for any broadcast not connected with, sponsored by or not in the interest of said Ford Motor Company, upon which terms the remuneration of the plaintiff under the said agreement is determined.

State of New York, }
County of New York, } ss.:

No. 46157 SERIES D

Form 2

I, ALBERT MARINELLI, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that

Ruth Stegman
.....
whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a NOTARY PUBLIC acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of.....
with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 11 day of Sept. 1936

Albert Marinelli

Clerk.

6. That an order of notice, returnable forthwith, issue to the defendant to show cause why each restraining order prayed for above should not be continued pending the determination of this case by this Court.

7. That said preliminary injunctions be made permanent.

8. That the defendant be ordered to pay to the plaintiff the sum of Three Thousand (\$3,000) Dollars in compensation for the aforesaid appropriation of his talents for broadcast purposes.

9. That the defendant be ordered to pay the costs of this action and that a reasonable attorney's fee be allowed to the plaintiff as part thereof.

10. For such other and further relief and such process as this Court may deem proper in the premises.


Plaintiff


Counsel for Plaintiff

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
CITY OF NEW YORK)

FRED WARING, being duly sworn, according to law, deposes and says that he is the plaintiff named in the foregoing Bill of Complaint, and that the facts set forth therein are true to the best of his knowledge, information and belief.

Sworn to before me this

8th day of September, 1936.


Ruth Skiegan

NOTARY PUBLIC, Kings County
Kings Co. Clerk No. 691 Reg. No. 4006
Cert. filed in N.Y. Co. Clerk No. 1728 Reg. No. 20193
Commission expires March 30, 1938

183-E

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH CAROLINA

FRED WARING,

Plaintiff,

- against -

RICHARD AUSTIN DUNLEA,

Defendant.

BILL OF COMPLAINT

JOHN GARWOOD NEWITT

Attorney - At - Law

1008 Independence Building

CHARLOTTE, N. C.

Counsel for Plaintiff

I certify that the within is
entered and filed this day.

SEP 22 1936

S. A. Ashe, Clerk

Clk.

Received the within at Wilmington, N.C. September 24th, 1936:
Executed same date and place by personal service on and
copy to Richard Austin Dunlea.

This 24th, day of Sept 1936.

F.S. Worthy, United States Marshal.

By M. G. Hatch
Deputy Marshal.

OFFICE OF U.S. MARSHAL
WILMINGTON, N. C.
SEP 20 1936
7202
15
PP 85

District Court of the United States of America

EASTERN DISTRICT OF NORTH CAROLINA

AT Wilmington, N.C.

FOURTH DISTRICT

THE UNITED STATES OF AMERICA

To Richard Austin Dunlea

, GREETING:

WE COMMAND YOU, and every of you, that you appear before the JUDGES OF OUR DISTRICT COURT OF THE UNITED STATES OF AMERICA, for the Eastern District of North Carolina, at the Office of the Clerk of said Court, in the City of Wilmington, N.C., in said District, on the 24 of October next, to answer the BILL OF COMPLAINT of Fred Waring

a citizen and resident of the State of Pensylvania, filed in the Clerk's Office of said Court, in said City of Wilmington, N.C., then and there to receive and abide by such JUDGMENT AND DECREE as shall then or thereafter be made, upon pain of Judgment being pronounced against you by default.

TO THE MARSHAL OF THE EASTERN DISTRICT OF NORTH CAROLINA TO EXECUTE.

WITNESS, The Hon. CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States, at Wilmington, N.C., in said District, the 23d day of September, 193 6, and in the 160th year of the Independence of the United States.

Issued the 23d day of September, 193 6.

S.A. Ashe

Clerk U. S. District Court.

By

Porter Hughes
Deputy Clerk.

The within-named defendants are notified that unless they enter their appearance in the Clerk's Office of said District Court, at Wilmington, N.C., and file their answer, or other defense, on or before the 20th day after service hereof, excluding the day of service, the bill filed herein will be taken as confessed and a decree entered accordingly.

S.A. Ashe,

Clerk U. S. District Court.

By

Porter Hughes
Deputy Clerk.

Received the within at Wilmington, N.C. September 24th, 1936:
Executed same date and place by personal service on and
copy to Richard Austin Dunlea.

This 24th, day of Sept 1936.

F.S. Worthy, United States Marshal.

By W. G. Hatcher
Deputy Marshal.

Fees, \$2.00

No. _____ Equity.

In United States District Court
EASTERN DISTRICT OF NORTH CAROLINA

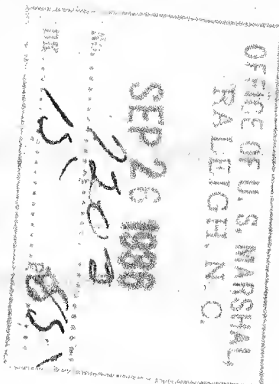
AT _____

against _____

EQUITY SUBPOENA

Returnable the _____ day
in _____, 1936

DUPLICATE ORIGINAL FOR _____



Solicitors for Complainants.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

.....
FRED WARING,
Plaintiff :
VS. :
IN EQUITY
RICHARD AUSTIN DUNLEA,
Defendant :
.....

NOW COMES the plaintiff in the above entitled cause and files the within interrogatories under the provision of Equity Rule 58, to be answered under oath by the defendant, Richard Austin Dunlea, within fifteen days after they have been served on his Solicitor of record, Alan A. Marshall.

1. What is your name?

Ans:

2. What financial arrangement did you have in radio station W. M. F. D. on June 25, 1936?

Ans:

3. Who had charge of the programs for the aforesaid station on the aforesaid date?

Ans:

4. Was any record kept of the musical compositions broadcast on the aforesaid station on the aforesaid date? If your answer is yes, please attach a copy of such record.

Ans:

5. Are you personally familiar with the musical composition "Wa-Hoo", or can you recognize it from being played?

Ans:

6. Can you swear positively that the aforesaid musical composition was not broadcast over station W. M. F. D. on June 25, 1936?

Ans:

7. Did you have in your possession on June 25, 1936, or any time prior thereto or subsequent thereto, an electrical transcription containing the recorded musical composition "Wa-Hoo" by Fred Waring and his Pennsylvanians?

Ans:

8. What financial interest does Bruce Cameron have in radio station W. M. F. D.?

Ans:

9. Have you a list of the announcements which were made over station W.M.F.D. on June 25, 1936? If your answer is yes, please attach a copy of such record.

Ans:

10. Please state the name of the person, firm, or corporation which holds the lease on W. M. F. D. studios, located in the Wilmington Hotel, Wilmington, North Carolina.

Ans:

11. Please state the name of the person, firm, or corporation which was entitled to the profits in the operation of radio station W. M. F. D. on June 26, 1936.

Ans:

12. Have you a list of the musical compositions which were broadcast after all spot announcements which were made over station W. M. F. D. on June 25, 1936?

Ans:

13. Who holds the license from the Federal Communications Commission for station W. M. F. D.?

Ans:

14. Did you have in your possession any transcription of the musical composition "Wa-Hoo" on June 25, 1936?

Ans:

15. If so describe the kind of transcription you had.

Ans:

16. Was any program ever broadcast by electrical transcription over Station W. M. F. D. on behalf of the Ford Motor Company, on or prior to June 25, 1936?

Ans:

17. Was any electrical transcription containing the performances of the plaintiff, including the musical composition entitled "Wa-Hoo", ever broadcast over Station W. M. F. D. with the authority or consent of the plaintiff?

Ans:

18. State whether the defendant, on or prior to June 25, 1936, had in his possession electrical transcriptions containing the performances of the plaintiff, including the musical composition entitled "Wa-Hoo".

Ans:

19. If so, state in substance or in detail the inscription or legend contained upon the labels of such electrical transcriptions.

Ans:

20. State whether any electrical transcriptions containing the performances of the plaintiff were broadcast over Station W. M. F. D. subsequent to June 25, 1936.

Ans:

21. If so, state in detail the nature of such performances, the announcements made in connection therewith, and the time of each such performance.

Ans:

22. Has the defendant or any other person connected with Station W. M. F. D. ever made an accounting to the plaintiff for the broadcasting of electrical transcriptions containing plaintiff's performances and interpretations, including that of the musical composition entitled "Wa-Hoo"?

Ans:

The defendant, Richard Austin Dunlea, is required to answer each and every one of the foregoing interrogatories numbered from one to fifteen inclusive.


ATTORNEY FOR PLAINTIFF

The foregoing interrogatories read and considered, it is hereby ordered that the defendant, Richard Austin Dunlea, answer each and every one of the foregoing interrogatories numbered from one to fifteen inclusive within fifteen days after they have been served on his Solicitor of record, as is required by said Equity Rule and this Court.

This the 17th day of November, 1936.


UNITED STATES DISTRICT JUDGE.

#183-Equity
Original

Fred Waring
Plaintiff

vs

Richard Austin Dunlea
Defendant

Interrogatories

(Index)
(Index)

I certify that the within is
entered and filed this day.
NOV 18 1936
S. A. ASHE, CLERK
Clerk.

JOHN CALDWELL HOWARD
Attorney at Law
1008 Independence Building
CHARLOTTE, N. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

.....
FRED WARING, :
 :
Plaintiff :
 :
VS. : IN EQUITY
 :
RICHARD AUSTIN DUNLEA, :
 :
Defendant :
.....

NOW COMES the defendant in the above
entitled cause and files the within answers to the interro-
gatories put to this defendant by the plaintiff in the above
entitled cause.

1. Richard Austin Dunlea
2. Stockholder and Manager
3. Richard Austin Dunlea and W. E. Britt
4. Yes. See copy attached marked "Exhibit A".
5. Yes
6. Yes
7. No
8. None--except as a minority Stockholder.
9. Yes. A copy of such record is not attached in view
of the fact that the type of announcement desired is not stated
by the plaintiff. The defendant's records of such announcements
are so kept as to make it impracticable to compile a complete
copy of the record of the day's announcements, Unless the
particular type of announcement is specified, inasmuch as
announcements covering advertisements are kept separate and the
different classifications are filed under separate heads. If
the plaintiff will furnish the defendant with a statement of the
type or kind of announcements plaintiff desires defendant will
gladly furnish said plaintiff with a copy of such record.

10. WMFD, Incorporated

11. Richard Austin Dunlea

12. Yes. See answer to question #4.

13. Richard Austin Dunlea

14. No transcription---but I do have a record.

15. Bob Pope's recording of "Wa-Hoo".

16. No

17. No---never owned or played any electrical transcription containing the performance of the plaintiff, nor has such transcription ever been broadcast over station WMFD, with or without the consent of plaintiff.

18. No

19. None played

20. No, none before or after.

21. None

22. No, as I have never broadcast such a transcription.

No other person connected with Station WMFD has broadcast said electrical transcription.

**Richard Austin Dunlea*

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

FRED WARING,	:	
	:	
Plaintiff	:	
	:	
VS.	:	VERIFICATION
	:	
RICHARD AUSTIN DUNLEA	:	
	:	
Defendant	:	

Richard Austin Dunlea, the defendant in the above entitled cause, first being duly sworn deposes and says that the foregoing and annexed answers are true to his own knowledge except as to those things stated therein on information and belief and as to them he believes it to be true.

x Richard Austin Dunlea

Sworn to and subscribed to
before me this the 1st day
of December, 1936

J. M. Johnston
Notary Public

My commission expires:
My Commission Expires May 7, 1938

"EXHIBIT A"

Radio Station WMFD
Request Program 2:00-2:30
Thursday, June 25th, 1936.
Announcer.....R. A. Dunlea

.....

Theme).....WABASH BLUES

Blue Illusion...
Andy Kirk and his orchestra

Is it true what they say about Dixie?
Ambrose and his orchestra

Lights Out
California Ramblers Orchestra

Mountain Dew Blues
Dick Hartman's Tennessee Ramblers

Wa-Hoo.....
Bob Pope's Orchestra

One Night in Monte Carlo...
Bob Crosby's Orchestra

Treasure Island
Teddy Wilson and his band

Sugar Blues
Clyde McKoy's Orchestra

Theme).....WABASH BLUES

IN THE DISTRICT COURT OF
THE UNITED STATES FOR
THE EASTERN DISTRICT OF
NORTH CAROLINA

FRED WARING

Plaintiff

VS.

RICHARD AUGUST DUNLEA

Defendant

IN EQUITY

I certify that the within is
entered and filed this day.

DEC 2 1936

A. A. ASHE, CLERK

Clerk.

Alan A. Marshall
Attorney
Wilmington, N. C.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NORTH CAROLINA,

FRED WARING

Plaintiff,

-Against-

RICHARD AUSTIN DUNLEA

: IN EQUITY
ANSWER

Defendant

The Defendant answering the bill of complaint
says:

1. Paragraph one is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

2. Paragraph two is admitted.

3. Paragraph three is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

4. Paragraph four is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

5. Paragraph five is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

6. Paragraph six is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

7. Paragraph seven is denied for want of information
or knowledge sufficient to form a belief as to the allegations
contained therein.

8. Paragraph eight is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

9. Paragraph nine is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

10. Paragraph ten is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

11. Paragraph eleven is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

12. Paragraph twelve is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

13. Paragraph thirteen is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

14. Paragraph fourteen is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

15. Paragraph fifteen is denied for want of information or knowledge sufficient to form a belief as to the allegations contained therein.

16. The Defendant answering paragraph sixteen admits so much of said paragraph as alleges that the Defendant, Richard Austin Dunlea, owns and operates for profit by license from the Federal Communications Commission a radio broadcasting station located in Wilmington, North Carolina, and known and designated as WMFD. All other allegations contained in said paragraph sixteen are untrue and therefore denied. And the

Defendant further answering said paragraph sixteen says that he does not now own or have in his possession, nor has he ever owned or had in his possession, an electrical transcription containing the Plaintiff's performance and interpretation of the musical composition "Wa-Hoo"; and that this Defendant, his agents, servants, or employees did not broadcast and reproduce the said electrical transcription containing the said musical composition by means of the radio broadcasting facilities of said station WMFD, or any other radio station, at the time complained of nor has said Defendant, his agents, servants, or employees ever broadcasted or reproduced said electrical transcription containing the said musical composition by any means at any time.

17. Paragraph seventeen is admitted.

18. Paragraph eighteen is denied.

19. Paragraph nineteen is denied.

20. Paragraph twenty and each subsection a, b, c, d, e, f, and g is denied.

21. Paragraph twenty-one is denied.

22. Paragraph twenty-two is denied.

23. Paragraph twenty-three is denied.

24. Paragraph twenty-four is denied.

25. Paragraph twenty-five is denied.

WHEREFORE the Defendant, having fully answered, demands judgment, dismissing the bill of complaint herein, besides the costs and disbursements of this action and reasonable counsel fees, and for such other and further relief as to the Court may seem just and equitable.


Solicitor for Defendant

Defendant.

By 

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

RICHARD AUSTIN DUNLEA, first being duly sworn,
deposes and says:

That he is the Defendant herein, that he has read
the foregoing answer and that the same is true of his own
knowledge except as to those matters therein stated on infor-
mation and belief, and as to these he believes it to be true.

R. A. Dunlea.

Sworn to and subscribed
before me this the 8th
day of October,
1936.

J. M. Johnston
Notary Public

My Commission Expires May 7, 1938

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF N. C.

IN EQUITY

FRED WARING

-vs-

RICHARD AUSTIN DUNLEA

ANSWER

I certify that the within is
entered and filed this day.

OCT 14 1936

R. A. Ashe, Clerk

Clerk.

Alan A. Marshall
Solicitor
Wilmington, N. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FRED WARING,	:	
Plaintiff	:	IN EQUITY #183
vs.	:	
RICHARD AUSTIN DUNLEA,	:	
Defendant.	:	<u>DECREE</u>

At the April, 1938, Term of the District Court of the United States for the Eastern District of North Carolina, Wilmington Division, held at the United States Court Room in the City of Wilmington, N. C., on the 25th day of April, 1938.

Present: The Honorable I. M. Meekins, United States District Judge.

This cause came on to be heard at the April, 1938, Term of Court.

Plaintiff represented by John G. Newitt of Charlotte, North Carolina.

Defendant represented by Alan S. Marshall of Wilmington, North Carolina.

It appearing to the Court, after the filing of briefs and argument of Counsel, and thereupon, upon consideration thereof, the Court finds the following facts:-

1. That the plaintiff, Fred Waring, is a citizen and resident of the United States and the State of Pennsylvania.
2. That the defendant, Richard Austin Dunlea, is a citizen and resident of Wilmington, North Carolina.
3. That the matter in controversy in this case exceeds, exclusive of interest and costs, the sum or value of \$3,000.00 and is between citizens of different states, and

that said damage would be as a minimum \$3500.00.

4. That the plaintiff, Fred Waring, is the sole and exclusive conductor, owner, and possessor of all rights of the orchestra "Fred Waring and His Pennsylvanians" and more especially the contractual rights, electrical transcription performances and property rights hereinafter referred to.

5. That the plaintiff is a unique and individual artist and performer and has both a national and international reputation as a recording, concert and radio artist.

6. That his said services and interpretative performances are a marketable property which he offers, sells and licenses from time to time for substantial amounts.

7. That the plaintiff was engaged by the Ford Motor Company for his exclusive broadcasting services and agreed with the Ford Motor Company that electrical transcriptions of his broadcasts might be made by them, the use of which transcriptions was to be specifically restricted to a single performance, at a specified time, by specified radio stations, of which the defendant was not one.

8. That by said contract plaintiff reserved all his property rights in and to his interpretative performances, as embodied in the aforesaid electrical transcriptions, and required that each of said transcriptions be stamped with a legend notifying the possessor of the restricted use thereof.

9. That neither the defendant nor any other party for the defendant has ever paid any consideration for the use or privilege of playing an electrical transcription of the plaintiff or his orchestra, nor has the plaintiff given his consent or license that the defendant could play or use over his radio broadcast station any electrical tran-

scription of the plaintiff.

10. That among the performances of the plaintiff, which were transcribed pursuant to the contract aforesaid was the plaintiff's rendition of a musical composition entitled "Wa-Hoo"; and said electrical transcription had stamped thereon the restrictive legend hereinbefore mentioned.

11. That at said times the defendant owned and operated radio station WMFD, which is heard by large numbers of persons in North Carolina and other adjoining states, and that the defendant's operations are commercial and interstate in character.

12. That both the plaintiff and the defendant are engaged in the business of selling musical entertainment to the public.

13. That the defendant, without the consent or authorization of the plaintiff, and contrary to said restrictive notice, played the electrical transcription "Wa-Hoo" on the 25th day of June, 1936, thereby interfering with and violating plaintiff's property rights in the said recorded rendition.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, AS
FOLLOWS:-

1. That the plaintiff is the owner and creator of a unique and personal interpretation of a musical composition, possessing a common law right in the same, and has a right to control and limit its use.

2. The individuality, personality and talents of the plaintiff as a musical interpreter identify his product, creation or performance in such a manner as to make it specifically recognizable by the public and give it special pecuniary value.

3. The talents, creations and interpretations of a performing artist may only be used or exploited under the terms and conditions imposed by the creator. Any other use is an infringement of his property right and an injury to his name and commercial worth.

4. Protection should be afforded all performers, irrespective of their importance, reputation or fame, the test being not the value of their property, but the exploitation of it by the user.

5. The law will follow science and the arts in throwing the necessary protection about property rights, both corporeal and incorporeal, tangible and intangible.

6. The making of an electrical transcription, or its limited distribution under such conditions as were imposed in the suit at issue, does not constitute a publication of the plaintiff's interpretative performance.

7. The use of an electrical transcription, such as has been made by the defendant herein, is a commercial use for profit.

8. The defendant's use of said electrical transcription is an interference with and a violation of the plaintiff's contract respecting the restrictive use of the transcription.

9. The defendant's use of said electrical transcription violated the express restriction stamped thereon and was an unlawful interference with the plaintiff's rights.

10. The legend stamped on the record created an equitable servitude regarding its use which a Court of Equity will enforce.

11. Such a servitude is not unreasonable nor in restraint of trade; on the other hand it serves to promote

the interest of artistic creators and thereby encourages the creation and dissemination of art, the ultimate result being of great benefit to the public.

12. Such a restriction, as contained in the legend stamped upon the electrical transcription, is not against public policy but tends to better commerce, foster a more reasonable use of the product and lessen the destruction of its commercial and artistic value.

13. The defendant's use of the transcription, contrary to the legend stamped thereon, constituted an interference with and a direct violation of the plaintiff's right to privacy.

14. The defendant's use of the electrical transcription constituted unfair competition with the plaintiff.

15. By such use the defendant is unfairly competing with the plaintiff performer and not with the recording company because the former sells a performance, the latter a commodity.

16. An orchestral conductor of artistic talent places his unmistakable "stamp" upon his orchestra and its interpretative renditions, so that the property rights herein considered fairly belong to him.

And it further appearing that the plaintiff is entitled to the relief requested in the complaint;

NOW THEREFORE, on motion of John G. Newitt, Attorney for the Plaintiff, it is further ORDERED, ADJUDGED and DECREED, that the defendant Richard Austin Dunlea, trading as Station WMFD or any of its agents, employees or representatives be, and he and they hereby are enjoined and re-

strained from using for broadcasting purposes or other commercial purposes any records made and created by the complainant, Fred Waring, and from the reproduction and performance of any such records for use as set forth in the complaint, in the several states of the United States.

BY THE COURT

J. Alb. Meehins

UNITED STATES DISTRICT JUDGE

DATED July 19th 1938

AT Elizabeth City, North Carolina.

Fred Waring

VS

R.A. Duplea

~~Deere~~

In Equity # 183

I certify that the within is
entered and filed this day.

JUL 22 1938

Thomas Dixon, Clerk
Clerk.

JOHN GARWOOD NEWITT
ATTORNEY AND COUNSELOR AT LAW
1008-09 INDEPENDENCE TRUST BLDG.
CHARLOTTE, N. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WILMINGTON DIVISION

FRED WARING, COMPLAINANT,

vs.

RICHARD AUSTIN DUNLEA, RESPONDENT.

OPINION.

This is an Equity Cause in which Complainant seeks to enjoin Respondent from using or playing on Respondent's radio station W M F D, certain electrical transcriptions of musical interpretations or renditions of Complainant's orchestra. A Notice appears on the record or electrical transcription that the record is to be used only on the Ford Motor Program and limited to such use on the part of the distributee. Respondent was not a distributee and the record was played by Respondent on a program other than the Ford Motor Program.

FINDINGS OF FACT.

1. That there is diversity of citizenship and the jurisdictional amount is present.
2. That Complainant is the owner of an orchestra, nationally known and that he made certain electrical transcriptions of his unique interpretations of different musical numbers, which for a consideration he distributed over the radio on a special program, known as the Ford Motor Program.
3. That the transcriptions contained a notice or legend that the use was limited to the distributee station for the purpose only of being played on a definite program.
4. That Respondent without the consent of Complainant, and not being one of the licensed distributees, played one of Complainant's musical numbers "Wa-Hoo" on his radio station, this number being one of the presentations of a musical number contracted for on the special program.
5. That both Complainant and Respondent are engaged in a business of selling musical entertainment to the public.

CONCLUSIONS OF LAW.

It appears to the Court that Complainant has created by his ef-

forts and talents a distinctive style known as his style, in the interpretations of musical numbers. He desires to sell or license such renditions. This presents the first question: Does Complainant have such an interest in his unique rendition that it is a distinct and separable property right? My answer is, Yes.

Rights in personal property are of no less importance than rights in real property. To say that person property cannot be divided in its uses and distribution of its uses would be like saying that real property can only be conveyed in fee simple. The other course has been definitely established. Land is subject to restrictions, and chattels are likewise subject to restrictive uses.

"Just as modern needs have brought equitable restrictions on land, of which the old common law knew nothing, into existence, they may also call for a limited departure from the free transfer of chattels for the sake of promoting desirable business practices wholly strange to Coke's day."

31 Harvard Law Review 945, 983.

Complainant has a property right in his performance. Complainant by mental labor creates something which is the subject of sale, for he has contracted for its rendition with the Ford Motor Company. It is his work, his property, and so recognized.

"Nothing can with greater propriety be called a man's property than the fruit of his brain."

Copinger's Law of Copyright, 5th Ed. Pg. 1.

A dramatic performance gives life to the story, and is the property of the interpreter. The great singers and actors of this day give something to the composition that is particularly theirs, and to say that they could not limit its use is to deny them the right to distribute their art, as they may see fit, when they see fit. Surely, their labors and talents are entitled to the privilege of distribution, especially where, as here, the privilege is subject to definite terms and bounds. They have an exclusive right in their property and thus have a right to prohibit its unauthorized public performance.

Ferris vs Frohman, 223 U. S. 424 (1912)
Palmer vs De Witt 47 N Y 532 (1872)
Tompkins vs Halleck 135 Mass. (1882)

Performance is not a publication.

Uproar Co vs Nat. Broadcasting Co 9 F. Supp 538 (1934)
Ferris vs Frohman 223 U S 424 (1912)

The distribution of intellectual property or work is capable of limitation.

Press Pub. Co vs Monroe 73 Fed Rep 196 (1896)

The restriction of the use of Complainant's interpretations are not unreasonable nor are they against public policy. If anything, they tend to create value, and develop interest in the arts, instead of interfering with the course of trade, which it does not since his works have never been placed in trading media, and since the artist by his restrictive covenant increases the uses and is more able to give his works and art to the public within proper limitations.

The radio, motion picture, television have great value and are the subject of popular demand and are as much the subject of property rights and deserve the protection of equity as the more concrete and definite easements in land.

"It requires but little argument to show that since a man has a right to withhold from all dissemination his thoughts, sentiments, and emotions no matter what their media of expression, he has a right to restrict or limit this dissemination."

"Applying that principle to the instant case it is my view that the plaintiff is entitled 'to decide whether, and when, and how, and for whose advantage' his rendition of musical composition shall be mechanically reproduced."

Waring vs W D A S 327 Pa 433, at 459,461.

Edison vs Edison Polyform Co 73 N J Eq 36
Foster Melborne Co vs Chinn 134 Ky 424
Kunz vs Allen 102 Kans 883
70 U S L Rev 435.

51 Harvard Law Review 171
38 Columbia Law Review 131
86 Univ of Penna Law Rev 217
23 Washington Law Rev Quarterly 283
15 N Y U Law Quat. Rev. 275.

To allow Respondent to benefit financially by Complainant's work and skill would be an unfair trade practice and equity will enjoin such an effort on the part of Respondent.

Relief ^{prayed} ~~requested~~ by Complainant allowed, and Decree signed in accord herewith.

James H. Heekin
UNITED STATES DISTRICT JUDGE.